

Beware - Music Use in Podcasts, Downloads and On-Demand Streams are Not Covered By Your SoundExchange Royalties

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July 21, 2011

Broadcasters beware - **podcasts with music** may be dangerous to your economic health. In recent weeks, I've come upon more than one incident where a broadcaster was providing podcasts containing music on their website, or allowing listeners to download or stream on-demand some new, hot song. I've even seen certain articles in the trade press advocating that stations do podcasts of their morning shows, or otherwise provide some sort of programming containing music on their websites in a manner in which the listener can listen over and over again to the same program or song. Broadcasters need to know that they are asking for trouble when they provide services like podcasts, downloads and on-demand streams containing music without getting specific permission from copyright holders to do so, as these uses are not covered by the SoundExchange royalties paid for webcasting, nor (in most cases) by your ASCAP, BMI and SESAC royalties.

The royalties paid to **SoundExchange** are for the right to **publicly perform sound recordings** in a **noninteractive** manner. In other words, they only cover streams where the user cannot get a specific song when they want it, and where listeners do not know the order in which songs will be played. **ASCAP, BMI and SESAC (the "PROs")** also cover public performances, but of the underlying musical compositions (the words and music of the song, as opposed to its recording by a particular singer or band). By contrast, "podcasts," (and here I mean an on-demand program that can be downloaded onto a digital device for later replay, and which can also usually be played immediately on someone's computer) are much like downloads - and involve a different right in music - the **right to reproduce and distribute the music**. The rights of reproduction and distribution are different from the public performance right, and the permission to make reproductions and distributions are granted by different groups than are the public performance right. SoundExchange and the PROs have nothing to do with granting this reproduction and distribution right (with the limited exception of ephemeral rights in streaming granted through the SoundExchange royalty - a concept too technical to be discussed here, and one that does not affect this warning. But, if you are interested in these rights, you can see our article that discussed ephemeral rights in a bit more detail, [here](#)). Podcasts, downloads and on-demand streams require a specific grant of rights

from the copyright holders of the sound recordings and the musical compositions for each piece of music that is being used.

Rights to the sound recording of most popular recorded music will typically come from the record label. And, for these sorts of on-demand uses, the rights to most recorded music will not be cheap and easy to obtain. It will come easily only for specific songs that the labels want to promote – sometimes referred to as “podcast safe” music. This music is usually a song from a new artist, or an alternate take of a new song by an established artist, meant to be used to promote a new release. Getting rights to the full catalog of music typically played by a music intensive radio station will require a negotiation with each record label and the payment of significant money - the kind of negotiation that has delayed the introduction of services like Spotify in the US for so long.

Rights to reproduction and distribution of the musical composition typically come from the music publishing company (or sometimes music publishing **companies** where there is more than one writer of a song). These licenses—known as “**mechanical licenses**”—can be obtained through a statutory license, setting out payments to the copyright holders of any musical work that has been publicly released, but only if some strict procedures set out by law are followed. These rights can also be obtained directly from the publishers or songwriters or, in many instances, through the Harry Fox Agency, which licenses compositions on behalf of many copyright holders. There are also a number of private companies that will help in getting the necessary licenses to use the musical composition. Depending on the use that you have in mind, the record companies may themselves have already cleared the right to the musical composition, and that right will come with the right to the sound recording when you negotiate for that right. But needless to say, it is not an easy process that will allow routine podcasts or downloads of music programming.

Even the podcast of the performance of a local artist, with his permission, may require a mechanical license from the songwriter or music publisher if the artist has been singing “cover” songs. So be careful when recording local artists - you may think that you are getting their music royalty free, and you may be avoiding the sound recording royalty and a negotiation with a record label, but you may still have the musical composition to deal with if the local performer has not written their own songs.

There are lots of other caveats and exceptions that may apply in certain circumstances. But these don't allow the routine podcast of music programs or the other types of uses described above. So be careful - or you may have the music industry knocking at your

door demanding an unexpected payment. For more information about these topics, check out our Advisory on the [Basics of Music Licensing in Digital Media](#).